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No. 15-474

In The
Supreme Court of the United States

ROBERT F. MCDONNELL,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

AMICUS BRIEF OF FORMER ATTORNEYS GENERAL IN SUPPORT OF PETITIONER

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Six former Attorneys General of Virginia – Republican and Democratic – respectfully submit this brief to the Court as *amici curiae* in support of the petition for writ of certiorari filed by Governor Robert F. McDonnell.[1]

INTERESTS OF *AMICI*

This brief is submitted by the following former Attorneys General of Virginia:

- Andrew P Miller (D) (1970-77)
- Anthony F. Troy (D) (1977-78)
- J. Marshall Coleman (R) (1978-82)
- Mary Sue Terry (D) (1986-93)
- Stephen D. Rosenthal (D) (1993-94)
- Mark L. Earley (R) (1998-2001)[2]

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[1] No party's counsel authored this brief in whole or in part. No party or party's counsel contributed money intended to fund preparing or submitting this brief. No person – other than *Amici* and their counsel – contributed money intended to fund preparing or submitting this brief. *See* U.S. Supreme Court Rule 37(6). On October 16, 2015, both petitioner and respondent filed with the Court blanket written consents to the filing of amicus curiae briefs.

[2] These six *Amici* include all living former Attorneys General of Virginia, other than those (i) who are now serving as jurists in the Commonwealth, or (ii) who represent (or have represented) parties with interests in this case, or (iii) who, because of their subsequent service as Governor, are not perceived as speaking principally as former Attorneys General.

While we held the office of Attorney General, we were charged with a variety of duties, including providing legal advice to the Governor of Virginia. This duty included providing any necessary advice related to the meaning of federal statutes potentially affecting a Governor's conduct in office. In addition, we were intimately involved in the public life of Virginia, understood its workings and actively engaged with citizens who sought to make their concerns heard by candidates and officeholders. Today, we have a continuing interest in promoting the orderly and fair application of the law, the conduct of government on sound and predictable principles, and broad participation in the democratic process.

We support Gov. McDonnell's petition for certiorari because the expansive interpretation of federal law on which his conviction was based is erroneous. It is completely alien to any legal advice that any of us would have given to any Governor of Virginia. Moreover, that expansive interpretation, if allowed to stand, would wreak havoc upon the public life of Virginia by casting a shadow of federal prosecution and imprisonment across normal participation in the democratic process.

Most importantly for purposes of certiorari, the opinion below conflicts with decisions of this Court and with the decisions of three other circuits, thus creating a dramatically different standard for the democratic process in the five States comprising the Fourth Circuit compared to the rest of the country. Certiorari is warranted so that all Americans will be subject to the *same* interpretation

of federal law on a matter closely touching their common interest in participatory democracy.

SUMMARY OF ARGUMENT

Gov. McDonnell's conviction is based on alleged violations of the Hobbs Act and the honest services statute which, in a nutshell, prohibit a *quid pro quo* arrangement in which a public official is given something of value (the *quid*) in exchange for an "official action" (the *quo*). Gifts to public officials usually take the form of campaign contributions, not the personal gifts shown here; however, that distinction is *not* relevant for purposes of these federal statutes. *See, e.g., United States v. Derrick*, 163 F.3d 799, 816-17 (4th Cir. 1998) ("[C]ampaign contributions may be the subject of a Hobbs Act violation, no less than any other payments."). Thus – and this is key – the nature of the *quid* does not change what constitutes a *quo*. *The sorts of actions at issue here either are – or are not – "official actions" whether they are allegedly linked to campaign contributions or to anything else of value.*[3] This important point appears to have been lost on the

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[3] As former Attorneys General, we recognize that some of the gifts at issue here may give the appearance of impropriety, but that is a different issue from whether there has been a violation of those federal laws that are purportedly the basis for the conviction. Moreover, without prejudging their potential application here, we note that Virginia already has in place statutes that address situations where gifts to an officeholder create an appearance of impropriety. *See* Va. Code § 2.2-3103(8) and (9). The expansion of federal law undertaken by the district court and court of appeals is as unnecessary as it is unwarranted.

Fourth Circuit. Thus, the decision below creates a very dangerous environment for public officials who receive campaign contributions and for citizens who give them.

Gov. McDonnell was convicted – and the convictions were affirmed – based on an overly-expansive interpretation of "official action." Four important legal doctrines demonstrate the error: (i) the rule of lenity, (ii) the stringency required where a statute implicates speech, (iii) the need for absolute clarity before altering the federal-state balance, and (iv) the need to avoid unreasonable results. The overly-expansive interpretation of "official action" in the decision below would wreak havoc on the public life of Virginia and the other States within the Fourth Circuit, and it would create a different rule for participatory democracy in the Fourth Circuit than the one that applies in other circuits.

ARGUMENT

I. The convictions rest upon an overly-expansive interpretation of what constitutes an "official action."

The statutes under which Gov. McDonnell was convicted require the performance of an "official action." *Evans v. United States*, 504 U.S. 255, 268 (1992) (noting that, to prove a violation of the Hobbs Act, the government must show "that a public official has obtained a payment to which he was not entitled, knowing that the payment was made in return for official acts").

To the layman, almost everything associated with a Governor may be viewed as "official" in one sense or another. The Executive Mansion is the Governor's "official" residence. Any luncheon or dinner held there is an "official" event (regardless of who pays for it). A photograph of the Governor posing with a citizen for a handshake is an "official" photograph, and those businessmen who accompany a Governor on an overseas trade mission are his "official" guests (even though they pay they own way).

Given the very broad – virtually unbounded – meaning of the word "official" when laymen speak about a Governor, it was essential for the trial court to have given the term "official action" a very specific definition and to have drawn clear boundaries around the term. Yet, the district court failed to do so and that failure has now been endorsed by the court of appeals.

A Governor clearly would be violating federal law (and state law) if, in exchange for something of value, he were, for example, to make a board appointment, or offer a government job, or promulgate an executive order, or award a state contract, or expend public funds, or approve the adoption of a regulation, or sign or veto legislation. All of these are clearly "official actions" within the meaning of these federal statutes, because they involve the actual exercise of government power. As Attorneys General, we would have quickly and emphatically said so.

But, the conviction here is not based on any evidence – or any theory – that Gov. McDonnell did any of these things, or anything similar. Instead, the district court gave jury instructions that defined "official action" far more broadly, so as to encompass various actions that are not part of any official duties, but that fall within the broad sweep on the indictment, for example: (i) ***arranging meetings*** for Jonnie Williams with Virginia government officials; (ii) ***hosting and attending*** events at the Governor's Mansion in order to ***encourage*** Virginia university researchers to initiate studies of anatabine and to promote Star Scientific's products to doctors; (iii) ***contacting*** other government officials to ***encourage*** Virginia state research universities to initiate studies of anatabine; (iv) ***allowing*** Jonnie Williams to ***invite*** individuals important to Star Scientific's business to exclusive events at the Governor's Mansion; and (v) ***recommending*** that senior government officials ***meet*** with Star Scientific executives. *See* Indictment, ¶ 111(c).

Endorsing this misguided approach, the Fourth Circuit found "official actions" in the most mundane and innocuous of activities: "asking a staffer to attend a briefing, questioning a university researcher at a product launch, and directing a policy advisor to 'see' him about an issue." App-73a. In other words, in the Fourth Circuit, it is now an "official act" within the meaning of federal bribery law if a public official tells a staffer simply to go and listen to what a constituent has to say, or asks a question of an academic researcher, or calls for a staffer simply to meet with him on a matter of interest to a constituent. This wholly undermines

the concept of "access" that this Court has said lies beyond the reach of federal anti-corruption statutes. Indeed, the Fourth Circuit went so far as to find an "official act" – and corruption – in Gov. McDonnell's statement about his own *personal* use of Anatabloc and his suggestion that others in the workforce might benefit from it as well. App. 74a.

As Attorneys General, none of us would have concluded that any of these actions – all involving access or speech – constitute "official actions" within the meaning of the federal statutes used by prosecutors here. We believe the Fourth Circuit's expansive view of "official actions" is in error. By affirming Gov. McDonnell's misplaced conviction, the Fourth Circuit not only erred, it threw into disarray the previously understood distinction between lawful and unlawful influence.

Our views on the reach of these federal statutes are informed by four important principles of statutory construction:

The Rule of Lenity: As Attorneys General, we were – and are – acutely aware of the importance of giving fair notice as to what the criminal law prohibits. Fair notice is a component of constitutional due process, and it is often manifested in "the rule of lenity," which is the long-established practice of resolving questions concerning the ambit of a criminal statute in favor of the defendant. This rule is "rooted in fundamental principles of due process which mandate that no individual be forced to speculate, at peril of indictment, whether his

conduct is prohibited." *Dunn v. United States*, 442 U.S. 100, 112 (1979) (citations omitted).[4]

In our view, the interpretation of law on which the convictions are based violates the rule of lenity because it blurs the line between (i) taking an "official action," to which these federal statutes apply, and (ii) granting or facilitating access to government officials, which this Court has repeatedly held does not constitute official action. *E.g.*, *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 360 (2010) ("[i]ngratiation and access are not corruption"). All five "official actions" alleged in the indictment appear to us as nothing more than granting or facilitating access.

If such acts can form the basis for Gov. McDonnell's conviction, it will be anyone's guess as to where the line between lawful and unlawful acts might be drawn. There will be no fair notice as to what the law prohibits. Due process – and the rule of lenity – will be violated. In order to reaffirm its previous rulings regarding citizen access to government officials – and restore the uniform national standard that the decision below eviscerates – this Court should grant the petition and overturn the convictions.

The First Amendment: The need for fair notice is especially acute here because at least some of the actions alleged in the indictment – and for

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[4] The rule of lenity is especially important where an expansive reading of the criminal statutes would expose the accused to the crushing penalties that were possible here: eleven criminal counts, each carrying a possible prison term of twenty years.

which Gov. McDonnell was convicted – fall within the category of ***speech***.[5] Despite the constitutional protections afforded to speech, the Fourth Circuit adopted a very expansive view of when speech by a public official is an "official action" and punishable as corruption. In explaining its decision to affirm the convictions, the Fourth Circuit cited the following evidence:

> "[T]he Governor is the Chief Executive of the Commonwealth. He has this bully pulpit, if you will, to go out and talk about issues."
>
> * * * * *
>
> When "the Chief Executive of the Commonwealth...embraces the worthiness of a product[,]...[i]t gives it a type of credibility."
>
> * * * * *
>
> [T]he opportunity to "showcase" a product at the Governor's mansion "automatically" imbues the product with "credibility"

App. 70a, 71a (quoting witness testimony).

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[5] Speech by a public official falls within the ambit of the First Amendment, at least where there is no verbal act involving the actual exercise of governmental power. *See, e.g., Pickering v. Bd. of Educ.*, 391 U.S. 563 (1968); *Garrison v. Louisiana*, 379 U.S. 64 (1964); *Wood v. Georgia*, 370 U.S. 375 (1962).

Any statute that is purported to prohibit such speech must be interpreted and limited in light of First Amendment jurisprudence. As Attorneys General, we understood full well that any statute restricting speech must be absolutely clear in what it prohibits. *E.g.*, *Hoffman Estates v. Flipside, Hoffman Estates*, 455 U.S. 489, 499 (1982) ("If ... the law interferes with the right of free speech or of association, a more stringent vagueness test should apply."). This principle applies here.

The issue is not whether Congress *could* prohibit an elected official from favoring a contributor with the sort of speech described in the indictment or in the opinion below. That is an issue for another day. The point is that, if Congress is to impose such a prohibition on speech, it may do so only through a statute that leaves no doubt about its meaning. As applied by the district court and court of appeals, the federal statutes at issue are too vague to pass such a test. This Court should grant certiorari in order to vindicate the important First Amendment principles jeopardized by the decision below.

Federalism: The federal statutes at issue here derive their legitimacy not from some general power of Congress to enact ethics rules for state officials (no such power exists), but from the power of Congress to regulate interstate commerce. *See, e.g.*, *Scheidler v. NOW, Inc.*, 547 U.S. 9, 17-18 (2006) (noting that the Commerce Clause granted Congress the authority to enact the Hobbs Act). Even so, these statutes obviously are not ordinary Commerce Clause regulations. They threaten to punish state

officials, including state governors, for certain actions while in office, thereby taking responsibility for such matters away from the States. As such, these statutes alter the federal-state balance.

"If Congress intends to alter the usual constitutional balance between the state and federal governments, it must make its intention to do so *unmistakably clear* in the language of the statute." *Gregory v. Ashcroft*, 501 U.S. 452, 460-61 (1991) (emphasis added) (internal quotation marks and citations omitted). "Congress should make its intention *clear and manifest* if it intends to pre-empt the historic powers of the States." *Id.* at 461 (emphasis added) (internal quotation marks and citations omitted). Indeed, "[i]nasmuch as [the Supreme] Court has left primarily to the political process the protection of the States against intrusive exercises of Congress' Commerce Clause powers, we must be *absolutely certain* that Congress intended such an exercise." *Id.* at 464 (emphasis added). *See also United States v. Enmons*, 410 U.S. 396, 411-12 (1973) ("We will not be quick to assume that Congress has meant to effect a significant change in the sensitive relation between federal and state criminal jurisdiction.").

The expansive interpretation of "official actions" on which the conviction is based cannot meet this rigorous standard. It is neither "unmistakably clear" nor "clear and manifest" that Congress intended to punish the sorts of activities described in the indictment. Nor can the Court be "absolutely certain" that Congress intended such a result, or that Congress sought to effect such

microscopic criminal oversight into the actions of a state governor. Certiorari should be granted. The conviction must not stand.

Avoiding Unreasonable Results: As former Attorneys General who often issued opinions interpreting statutes, we are mindful of the canon of construction that seeks to avoid unreasonable results. *See, e.g.*, *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 515 (1989) ("the law favors constructions which harmonize with reason, and which tend to avoid unjust, absurd, unreasonable or confiscatory results, or oppression."). The Fourth Circuit's overly-expansive interpretation of federal law would violate this canon by casting a shadow of federal prosecution and imprisonment across normal participation in the democratic process.

II. The overly-expansive interpretation of "official action" in the decision below would wreak havoc on the public life of Virginia and the other States within the Fourth Circuit.

As noted earlier, what constitutes an "official action" does not change based on the nature of the contribution given to the officeholder. Whatever definition is applied here also must apply in future cases where the gifts are fully-reported contributions of campaign funds. If the acts at issue here constitute "official actions" of the Governor for purposes of federal criminal law, then *any* favorable and customary treatment by an officeholder – including meeting with a citizen or a simple nod of approval – would constitute "official actions" as well.

This would pose serious problems both for the officeholder as well as the citizen.

Living under such a restrictive regime, future Attorneys General would be well-advised to counsel their Governors to abstain from *any* favorable treatment of *any* campaign contributor, lest they risk being accused of having engaged in a *quid pro quo* transaction in violation of federal law. This would have far-reaching consequences affecting many actions in which Governors customarily have engaged. It would affect, for example, whom Governors can invite into their home, the Executive Mansion; or what personal introductions they can facilitate; whom Governors can invite on trade missions; and whom Governors (or other officeholders) can meet about government business.

The interpretation of "official action" reflected in the jury instructions and decision below implicitly includes all such customary activities and, thus, subjects the officeholder to the risk of federal prosecution if favoritism is shown to a contributor. Such results are "unjust, absurd [and] unreasonable." *Webster*, 492 U.S. at 515.

Moreover, these federal criminal statutes apply not just to the *officeholders* who received the contributions; they apply as well to the *citizens* who gave them.[6] The expansive interpretation of those statutes by the court of appeals will chill the exercise

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[6] While federal prosecutors gave Jonnie Williams (their chief witness and the purported "briber") complete immunity, the next contributor who receives access from a public official may not fare so well.

by citizens of their First Amendment rights to participate in the democratic process. Such a result would wreak havoc not only on the public life of Virginia, but also on the public life of those other States falling under the jurisdiction of the Fourth Circuit.

Meanwhile, the decisions of at least three other circuits – the First, Eighth and D.C. Circuits – have drawn far different lines as to what constitutes "official action" for purposes of federal anti-corruption statutes. *See United States v. Urciuoli*, 513 F.3d 290 (1st Cir. 2008) (drawing distinction between actions that invoke *official powers* and those that merely trade on the *reputation and prestige* of those holding public office); *United States v. Rabbitt*, 586 F.2d 1014 (8th Cir. 1978) (drawing distinction between *affording access* to those who can make a decision and *trying to control* the ultimate outcome); *Valdez v. United States*, 475 F.3d 1319 (D.C. Cir. 2007) (*en banc*) (drawing distinction between an informational inquiry about a matter and inappropriate influence on another governmental decision maker).

We will not seek to duplicate the detailed discussion of these cases already set forth in the petition. *See* Pet. at 17-26. Suffice it to say that, under the standards applied by these other three circuits, Gov. McDonnell could not have been convicted. On matters affecting the democratic process – which frequently cross state boundaries and in which all Americans share a common interest – it is essential that there be a single, well-articulated, nationwide standard for when federal

criminal law comes into play. For this reason, too, Gov. McDonnell's case merits review by this Court.

CONCLUSION

The petition for writ of certiorari should be granted.

Respectfully submitted,

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By: /s/ William H. Hurd

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